

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH G. HALL)	
Claimant)	
)	
VS.)	
)	
NORTHWEST PIPE OF KANSAS, INC.)	
Respondent)	Docket No. 241,567
)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Claimant requested review of the August 1, 2005 Post Award Medical and Review & Modification Award by Administrative Law Judge Bryce D. Benedict.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared for the claimant. Patricia A. Wohlford of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant suffered multiple injuries in a fall at work on May 5, 1998. On September 8, 2000, the parties entered into lump sum settlement of this workers compensation claim based upon a compromised 15 percent permanent partial disability rating to the whole person but with claimant's right to review and modification as well as future medical treatment left open.

On August 4, 2004, claimant filed an Application for Review and Modification as well as an Application for Post Award Medical. Claimant alleged his low back condition had

worsened resulting in an increased functional disability and he needed additional treatment for his low back. The two applications were consolidated and considered at a hearing held May 19, 2005. The Administrative Law Judge (ALJ) noted claimant had neither sought nor received medical treatment in the intervening years after he reached maximum medical improvement in 1999. The ALJ determined that claimant's current low back problems were related to his subsequent activities as an over-the-road truck driver and not a natural consequence of the work-related injury on May 5, 1998. Consequently, the ALJ denied claimant's requests for benefits.

The claimant requests review and argues his back condition has worsened as a result of the natural progression of his May 5, 1998 accidental injury. As a result of that worsening claimant sought medical treatment and requests payment of the medical bills associated with that treatment. Claimant argues his low back impairment has increased and his impairment is now a 10 percent whole person functional impairment. Claimant further argues he is entitled to 5 weeks of temporary total disability compensation.

Respondent argues the ALJ's Award should be affirmed except the attorney's fees assessed against the respondent should be reversed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On May 5, 1998, claimant fell 10 to 15 feet from a load of pipe and hit the ground injuring his chin, jaw, low back and left elbow. Claimant was deemed to have reached maximum medical improvement by November 1999.¹ Dr. Douglas M. Rope performed a court ordered examination of claimant on February 2, 2000. The doctor diagnosed claimant with chronic low back discomfort due to muscular strain with no evidence of compression of the lumbar nerve roots. As part of his overall 15 percent functional impairment rating, the doctor assigned 5 percent to the lumbar spine based upon DRE Lumbosacral Category II of the *AMA Guides*². Dr. Bieri also concluded claimant had a soft tissue injury to the lumbar spine which he rated the same as Dr. Rope. As previously noted, the parties settled this claim based upon Dr. Rope's 15 percent rating.

At the time of the review and modification hearing, claimant had been employed approximately five years as a truck driver for Alex R. Masson. Claimant drives an 18-

¹ Bieri Depo., Ex. 3.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

wheeler truck hauling plants weekly from Linwood, Kansas, to Denver, Colorado. He unloads the boxes weighing 10-20 pounds at multiple stops during a two to three day period after he arrives in Denver.

In May 2004 the claimant experienced low back pain radiating into his right leg while getting out of bed in the morning. He sought treatment at the Winchester Clinic on May 18, 2004. Dr. Larry Campbell examined the claimant and prescribed some medication. The pain continued and the claimant then sought treatment with Dr. Carlos Chavez.

Dr. Chavez saw the claimant on May 21, 2004, with regard to severe low back pain which was radiating down into his right leg. The claimant advised Dr. Chavez that he was getting out of bed and developed this severe back pain. Claimant advised Dr. Chavez that he had flare-ups and episodes of back pain intermittently. On physical examination, the doctor opined the claimant had tenderness across his low back and had increased pain with straight leg elevation. Dr. Chavez prescribed some anti-inflammatory and muscle relaxant medications as well as injections for pain and nausea. Dr. Chavez also ordered an x-ray of claimant's lumbosacral spine which revealed mild degenerative changes at the facet joints. On May 25, 2004, the claimant returned to see Dr. Chavez. Claimant still had tenderness across his lumbar spine area as well as positive straight leg elevation. Dr. Chavez recommended an MRI to see if claimant had a herniated or bulging disk. The MRI on May 27, 2004, revealed a left paracentral herniated disk and concentric bulging of the annuli at L4-5 but without true disk herniation or AP canal stenosis. On June 1, 2004, the claimant returned for a follow-up visit and was referred to an orthopedic specialist, Dr. Schmidt. Dr. Chavez took the claimant off work for approximately five weeks.

Dr. Michael J. Schmidt, an orthopedic surgeon, saw the claimant on June 2, 2004, with complaints of low back and right extremity pain. Claimant advised Dr. Schmidt about his previous work-related injury in 1998 but the claimant did not tell the doctor about the acute pain he experienced getting out of bed in May 2004 nor that he had ongoing symptoms in the intervening six years after the May 5, 1998 accident.

On June 14, 2004, the claimant returned to see Dr. Schmidt. At that time, the claimant indicated he was better with regard to his low back and right lower extremity pain. The claimant told Dr. Schmidt about his current over-the-road truck driving job. Dr. Schmidt diagnosed the claimant with low back pain radiculopathy secondary to a bulging or small ruptured disk which was aggravated by over-the-road truck driving. Dr. Schmidt testified:

Q. And what was your impression on examination?

A. My impression was that it was a recent low back pain radiculopathy. Probably secondary to a bulging or small ruptured disc aggravated by over-the-road truck driving.

Q. What do you mean by aggravated by over-the-road truck driving?

A. That driving a truck, the act of driving a truck is traumatic on lumbar discs just by virtue of the fact the patient is sitting. The vibration of machinery tends to irritate and aggravate a lumbar disc condition.³

Dr. Schmidt recommended the claimant continue the Celebrex medication daily and conservative management such as daily stretching, using a heating pad and hot tub soaks. Dr. Schmidt opined the claimant's bone scan that was performed on June 10, 2004, was normal.

At claimant's attorney's request, the claimant was examined and evaluated again by Dr. Peter V. Bieri on December 20, 2004. Dr. Bieri diagnosed the claimant as having a herniated nucleus pulposus with radiculopathy due to his original injury on or about May 6, 1998. The doctor determined the claimant had reached maximum medical improvement on December 20, 2004, and assigned a 10 percent whole person impairment to the claimant's lumbosacral spine based on the DRE, Category III of the *AMA Guides*.

But Dr. Bieri agreed claimant had not provided a history of his current work activities or what claimant did on a daily basis for his current employer. And the doctor agreed it was certainly possible to aggravate a low back condition by over-the-road truck driving.

Dr. Chavez did not offer an opinion as to the cause of claimant's current back condition.

Q. Okay. All right. Do you have an opinion, within a reasonable degree of medical probability, as to the etiology or cause of Mr. Hall's complaints when he came to see on May 21 of 2004?

A. The first time you mean?

Q. Yes.

A. No, sir, I don't. I couldn't tell myself he had pain in his back or the problems were related to his original injury. I didn't know myself, and still I don't know and I cannot tell, yes.

Q. Okay.

A. You know, I don't know.⁴

Claimant testified he has not had any back problems while driving the truck for his current employer. And that over the years he experienced flare-ups of back pain which he

³ Schmidt Depo. at 11.

⁴ Chavez Depo. at 19-20.

controlled with over the counter medication. Claimant agreed the incident getting out of bed was the first time he had ever experienced pain that severe with radiculopathy down into his right leg. Finally, claimant agreed he never sought nor received any medical treatment for his back in the intervening years after his court ordered independent medical examination with Dr. Rope in February 2000.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*⁵, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*⁶, the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*⁷, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁶ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*⁸, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”

Here, the Board finds this circumstance to be more akin to that found in *Stockman* rather than *Gillig*. Claimant’s original low back injury was diagnosed as a sprain/strain. At that time the court ordered independent medical examiner concluded there was no evidence of nerve root compression. After claimant reached maximum medical improvement he never sought additional medical treatment for his back in the intervening four or five years. This evidence supports the finding that his back sprain had resolved or subsided. Claimant then became an over-the-road truck driver and experienced the incident where as he was getting out of bed with back pain more severe than he had before as well as pain radiating into his right leg. His current treating physician, Dr. Schmidt, concluded the claimant’s truck driving activities caused his recent low back pain radiculopathy.

Based upon a review of the entire evidentiary record, the Board agrees with the ALJ’s determination that Dr. Schmidt’s opinion that claimant’s current condition is related to his activities as an over-the-road truck driver and not the accident six years ago. The Board affirms the Award.

Respondent further argues the ALJ’s award of attorney fees to claimant’s counsel should be reversed. Respondent does not dispute the amount requested was improper. In its brief to the Board, respondent makes the argument that because the treating doctors did not relate the claimant’s injury back to the original accident the instant claims were unreasonable and not based upon any rational basis. This argument overlooks the testimony of claimant and Dr. Bieri. Although the Board ultimately found the testimony of Dr. Schmidt more persuasive, it cannot be said there was no basis for claimant’s position. The ALJ’s award of attorney fees is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the August 1, 2005 Post Award Medical and Review & Modification Award of Administrative Law Judge Bryce D. Benedict is affirmed.

IT IS SO ORDERED.

⁸ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

Dated this _____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director